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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BERNARD GORSTEIN,

Plaintiff and Appellant,

v.

GOVERNMENT EMPLOYEES  
INSURANCE COMPANY,

Defendant and Respondent.

B173465

(Los Angeles County  
Super. Ct. No. BC265335)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Judge. Affirmed.

Bernard Gorstein, in propria persona, for Plaintiff and Appellant.

Cummins & White, Larry M. Arnold and Annabelle M. Harris, for Defendant and Respondent.

## I. INTRODUCTION

This is a homeowner's contract and implied covenant breach lawsuit against his insurer. It arises out of damage to a residence caused by the 1994 Northridge earthquake. Plaintiff, Bernard Gorstein, appeals from a summary judgment in favor of defendant, Government Employees Insurance Company. We find no triable issue of material fact. Accordingly, we affirm the judgment.

## II. BACKGROUND

### A. The Insurance Appraisal Award And Judgment Entered Thereon; Case No. PS002191

Defendant issued a homeowner's insurance policy to plaintiff and his then wife, Joyce Gorstein. The Gorsteins are now divorced. The policy covered the Gorsteins' residence. The limits of liability under the policy were \$241,500 for the dwelling, \$24,150 for other structures, \$120,750 for personal property, \$48,300 for loss of use, \$100,000 for personal liability, and \$1,000 for medical payment to others. The deductible in case of earthquake damage was 10 percent of the amount of insurance that applied to the destroyed or damaged property.

The Gorsteins' residence was damaged in the January 17, 1994, Northridge earthquake. On January 28, 1994, the Gorsteins notified defendant their residence had sustained damage. Defendant investigated the Gorsteins' claim and, in addition to paying living expense benefits, sent them two checks totaling over \$109,000 as compensation for the earthquake damage. The Gorsteins refused to accept the payments. They stated the scope of damage was incomplete. They returned both checks to defendant.

Because there was a dispute as to the amount due under the policy, defendant demanded an appraisal of the loss pursuant to the policy. The parties agreed in writing

on the scope of the appraisal. The appraisal was to include: the cost to restore the property to its pre-earthquake condition; costs occasioned by the enforcement of any ordinance or law regulating the reconstruction, repair, or demolition of the property as a result of the earthquake; the actual cash value of the damage to the property; the amount of preexisting damage; the amount of loss attributable to soils failure caused by the earthquake; the amount of time necessary to repair the damage; the cost of removing debris; the amount of loss and damage to trees, shrubs, plants, or lawns; and the cost to remove asbestos from the property. The document setting forth the scope of the appraisal was signed by an attorney, Jeffrey D. Diamond of Slott & Diamond, as counsel for the Gorsteins. The appraisers issued an award on January 20, 1995. They found, among other things, that the actual cash value of the loss was \$112,000 and the loss to other structures was \$9,000.

On May 3, 1995, the Gorsteins filed a petition to vacate the insurance appraisal award pursuant to Insurance Code section 1286.2, subdivision (c). The Gorsteins argued the appraisers had not undertaken sufficient investigation to accurately determine the cost to repair or replace the property. The petition alleged: "Subsequent investigation conducted on behalf of the Gorsteins has disclosed that in performing their function, the . . . appraisers failed to conduct the necessary investigation and discovery to accurately determine the cost to repair or replace the subject property to its pre-earthquake condition in that the Gorsteins are informed and believe and based thereon allege that the appraisers failed to properly expose the wall and ceiling framing of the dwelling to accurately determine the scope and extent of the property loss sustained by the Gorsteins in order to determine the amount to which they were entitled to be paid under the subject policy, as the appraisers were bound to do under the Scope of Appraisal. The Gorsteins are further informed and believe and based thereon allege that the full cost to repair their earthquake damaged dwelling exceeds the amount awarded by the appraisers by a sum of not less tha[n] \$95,000 or approximately 50 percent more than the \$180,000 awarded by the

appraisers.” On July 6, 1995, Judge John P. Farrell denied the petition to vacate the appraisal award.

On August 25, 1995, defendant filed a petition to confirm the appraisal award. On November 3, 1995, Judge Farrell confirmed the appraisal award and ordered entry of a judgment thereon. A judgment incorporating the appraisal award was entered on December 6, 1995. No appeal was taken from the judgment. In March 1996, defendant paid the Gorsteins over \$94,000—the amount awarded by the appraisers as the actual cash value of the loss to the residence and other structures less the deductibles.

B. Case No. BC130888

On June 30, 1995, while their petition to vacate the appraisal award was pending, the Gorsteins filed an action against defendant and others. The Gorsteins alleged: breach of the insurance contract; breach of the implied covenant; and intentional emotional distress infliction. The Gorsteins claimed, among other things, that: defendant failed to make prompt payment under the policy; retained incompetent engineers and contractors who underestimated the damage to the property; and forced the Gorsteins into an unfair appraisal. The parties subsequently agreed to settle the action. Defendant agreed to pay the Gorsteins an additional \$105,000, as well as \$7,385.32 that had been held in a trust account for them. In return, both of the Gorsteins signed a release of liability dated January 16, 1997. Additionally, “Michael M. Levin” as “Attorney for Joyce Gorstein.” signed the release. On January 30, 1997, the Gorsteins voluntarily dismissed their entire action with prejudice.

## C. Case No. BC265335 (The Present Action)

### 1. The Complaint

On December 28, 2001, plaintiff filed the present action—a complaint for contract and implied covenant breach against defendant and others. Plaintiff alleges in the first amended complaint that defendant breached the duty of good faith and fair dealing by: unreasonably withholding benefits due under the policy; forcing plaintiff to participate in an unfair appraisal proceeding in which he had no counsel; continuing to make misrepresentations to him; and engaging in unfair business practices.

### 2. Defendant's summary judgment motion

Defendant filed a summary judgment or adjudication motion. Defendant presented evidence as set forth above in the background portion of this opinion.

### 3. Plaintiff's opposition

Plaintiff presented evidence that in February 1994, the City of Los Angeles Department of Building and Safety (city building department) advised him his residence had been “red-tagged” indicating “serious structural damage.” In May 1994, the city building department issued an order to comply. The order to comply stated, among other things, that a structural evaluation of the Gorsteins' residence was required and the building was leaning. The order was given to defendant. An August 15, 1994, letter from the city building department likewise advised, “The structural integrity of the building appears to be significantly damaged and should be evaluated by a structural engineer.” The August 15, 1994, letter was also given to defendant. Defendant never

authorized a licensed structural engineer to inspect, test, or make a report. Defendant was also given a report by “the SBA” stating that the home was destroyed.

Plaintiff asserted the appraisal report had been “fixed” and was therefore invalid. In support of that claim, plaintiff presented evidence that he described as follows: “Attached . . . is a true and correct copy of a report from the California Individual and Family Grant Program dated May 19, 1999. This reports a conversation with Chuck Wright of GEICO one day before the appraisal award was issued. This indicates that GEICO had prior knowledge of the amount that would be awarded by the appraisers prior to the award being issued.” The document to which plaintiff refers states in pertinent part: “Chuck also said [on January 19, 1995,] that they have set up a trust fund for Mrs. Gorstein in which they are depositing her claim checks. So far \$107,918 for real property [¶] 21,200.98 for p[ersonal] property [¶] 20,614.65 for loss of use and M & S [¶] for Dec. & Jan. 2,200 for loss of use and M & S.”

Defendant hired a civil engineer, not a structural engineer, to assist in their valuation of the loss. Plaintiff obtained a structural engineering report of the damage to the structure. In a report dated November 25, 1996, concerning an inspection on November 7, 1996, Marvin A. Hornstein, a structural engineer, recommended, “In view of the extreme damage to the structure, I recommend demolishing the entire house and rebuilding it. In my professional opinion, the cost of repairing the house in a proper manner, and in accordance with current city code requirements, will exceed the cost of demolishing the house and rebuilding it.” Plaintiff declared, “This report was not considered by the appraisers.” An employee of Cabrillo Geotechnical, consulting engineers and geologists, inspected the property at defendant’s request. The Cabrillo Geotechnical employee recommended that a qualified structural engineer evaluate the residence. Defendant also obtained, but failed to disclose, a report by American Appraisal listing the “Local Replacement Cost New” as \$354,648.

With respect to the appraisal process, plaintiff declared: “My attorney insisted I sign the scope of appraisal document as he indicated I would lose the case if I didn’t.

This was not true. This fear of economic loss forced me to agree to something that I did not trust or understand. This fear of economic loss gave me a mental picture of dread that caused me to sign the appraisal agreement. It was undue influence.” Additionally, plaintiff declared: “I agreed to the Scope of Appraisal due to the undue influence of my attorney, Jeffrey Diamond. In his letter to me (Ex. 13) he indicated that if I did not agree to the appraisal process I would lose everything. I was panicked by this letter and agreed reluctantly to the appraisal. I had one meeting with Mr. Vardi the appraiser recommended by Mr. Diamond. I was never notified of any hearing by any of the appraisers. I never had an opportunity to present any evidence for them to consider. I never received any separate cost estimates from each of them (including the neutral umpire) as required by the scope of appraisal. . . . [¶] [] When I signed the Scope of Appraisal I believed that there would be a hearing at which the two appraisers and the neutral umpire would present their findings and I would have an opportunity to present evidence. Such a hearing was never held.”

Keith M. Godliman, a certified asbestos consultant, employed by So Cal Environmental prepared a report as to asbestos removal under contract with Mrs. Gorstein. Mr. Godliman found: material containing asbestos was present in linoleum under the kitchen tile; “[t]ransite asbestos pipe” was “present above the water heater; and the asbestos needed to be removed. A further asbestos survey of the residence was performed for Mrs. Gorstein by Patrick Michaels of Asbestos Analysis Laboratories in October 1995 to determine “possible asbestos encounters expected during repairs or reconstruction.” The October 3, 1995, report concluded: “[A] great error was made in the handling of the asbestos issue at this location. A thorough survey for the presence of asbestos-containing material was not undertaken . . . . Furthermore, decisions [that] were made regarding the handling of asbestos containing materials in this location were often made by non-asbestos certified consultants . . . . My knowledge of this is based primarily on a review of the available documentation given to me by the client.” A report dated January 16, 1995, which was utilized by the appraisers, Karl Blaufuss, a civil engineer,

noted, “An evaluation for the presence of asbestos materials is required prior to full costing of the damage, as the presence of asbestos will increase the demolition/cleanup costs.” A report prepared by SIRCO-ACR, an adjusting entity, dated March 7, 1994, estimated the cost to repair the residence at \$156,691.12. The estimate did not include the asbestos removal. A second SIRCO-ACR estimate, dated April 1, 1994, showed a cost of \$144,363.11, not including asbestos removal.

With respect to his execution of the release in case No. BC130888 in January 1997, plaintiff offered the declaration of Samuel A. Wilson, M.D. Dr. Wilson had treated plaintiff for “a series of medical problems” between 1996 and 1997. At that time according to Dr. Wilson, plaintiff was then “having a great deal of difficulty psychiatrically” and complained of depression. Dr. Wilson believed plaintiff “was not logical” and was therefore sent to a psychiatrist, Dr. Lee Bloom. In early 1997, Dr. Wilson stated “[Plaintiff’s] depression, flight of ideas, inability to focus on individual subjects, and labile affect made me feel that [he] was not in full possession of his judgment . . . .” Dr. Wilson concluded, “In a legal sense, I would say he was non compos mentis.” The trial court also accepted into evidence during oral argument a March 30, 1999, letter from Lee Bloom, M.D., a psychiatrist. Dr. Bloom stated that plaintiff continues to have a cycle of depression from the earthquake. In addition, plaintiff declared: “From 1996 I was severely depressed and sought treatment from Dr. Wilson and another doctor. In January of 1997 when the release was presented to me I was without an attorney and was under the care of Dr. Wilson. Due to my depression [and] advanced age (I was 74) and diminished legal capacity *I was unable to understand the meaning of the release.* I had no attorney or anyone else to review the document or advise me.” (Italics added.)

Plaintiff’s declaration concludes: “I believe [defendant] acted in bad faith with respect to this claim. They failed to engage a structural engineer to evaluate the structural damage to my house despite many orders to do so by the City of Los Angeles. They knew from various reports that the house was completely destroyed but they maintained

that it could be repaired. They forced me into an unfair appraisal procedure that did not allow me to submit evidence or contest the findings of the appraisal panel. [¶] [¶] [Defendant] advised the Insurance Dept. of California that they would strictly comply with the requirements of the City of Los Angeles. The City of Los Angeles told them to get a structural engineering report in August of 1994. They never did so. They obtained an estimate that the cost of repair on my house was \$354,000 but this was never shown to me or the appraisers. At all times they acted to obstruct and subvert the claims process to prevent me from obtaining a fair amount for the loss. Their tactics led me to develop severe depression that required medical treatment for a number of years. All of these events took place before the backdrop of a substantial loss of my home and the trauma of a devastating earthquake.”

#### 4. Defendant’s reply

Defendant submitted a reply to plaintiff’s summary judgment opposition. Defendant raised evidentiary objections to plaintiff’s evidence in opposition to the summary judgment or issue adjudication motion. However, defendant failed to secure rulings on the evidentiary objections in the trial court. As a result, those objections have been waived. (E.g., *People v. Millwee* (1998) 18 Cal.4th 96, 126; *People v. McPeters* (1992) 2 Cal.4th 1148, 1179; *Goodale v. Thorn* (1926) 199 Cal. 307, 315; *Campbell v. Genshlea* (1919) 180 Cal. 213, 220; see also *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186-1187, fn. 1, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19.) Also, defendant presented evidence it retained Lovelace Engineering to inspect plaintiff’s property and to identify any structural damage. An employee of Lovelace Engineering inspected the property on two occasions and issued reports as to structural damage.

5. The trial court's summary judgment ruling

The trial court granted summary judgment. The court found, among other things, that defendant's appraisal process complied with the law and barred plaintiff's claims. Plaintiff's reconsideration motion was denied. Judgment was entered on March 2, 2004.

IV. DISCUSSION

A. The Notice of Appeal

Plaintiff purports to appeal from the orders granting the motion for summary judgment and denying a reconsideration request. No appeal lies from the order granting the summary judgment motion. (Code Civ. Proc., § 904.1; *Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1010; *Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1816; *Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1073-1075.) No appeal lies from the order denying plaintiff's reconsideration motion. (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1229-1230; *Crotty v. Trader* (1996) 50 Cal.App.4th 765, 768-769; *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 210; *Rojas v. Riverside General Hospital* (1988) 203 Cal.App.3d 1151, 1160-1161; see *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 5, fn. 1.) However, we treat plaintiff's February 18, 2004, notice of appeal as from the judgment subsequently entered on March 2, 2004. (Cal. Rules of Court, rule 2(c); *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669; *Vesely v. Sager* (1971) 5 Cal.3d 153, 158, fn. 2; *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 333-334, fn. 1.)

## B. The Summary Judgment Motion

### 1. Standard of review

We apply the following standard of review as articulated by the Supreme Court. In *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pages 850-851, the Supreme Court described a party's burdens on a summary judgment or adjudication motion as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof . . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted; see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) We review the trial court's decision to enter summary judgment de novo. (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at pp. 65, 67-68; *Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1188.) The trial court's stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196; *Dictor v. David & Simon, Inc.* (2003) 106 Cal.App.4th 238, 245.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252;

*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) Those are the only issues a motion for summary judgment must address. (*Ibid.*; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

## 2. The Release

Plaintiff concedes, “The issue of insurance bad faith would have been resolved by the release [in the prior insurance bad faith action] if the [plaintiff] had the capacity to know what he was signing.” However, plaintiff contends he was incompetent when, in January 1997, he executed the release in his prior insurance bad faith action, the release is therefore void, and the present action is not barred. We find there is a triable issue of material fact as to whether the release is void.

Dr. Wilson treated plaintiff for “a series of medical problems” in 1996 and 1997. According to Dr. Wilson, plaintiff was then: “having a great deal of difficulty psychiatrically”; complaining of depression; “not logical”; and “not in full possession of his judgment . . . .” Dr. Wilson concluded, “In a legal sense, I would say he was non compos mentis[,]” in other words, incompetent. Black’s Law Dictionary defines “non compos mentis,” a Latin phrase meaning “‘not master of one’s mind’” as “insane” or “incompetent.” (Black’s Law Dict. (8th ed. 2004).) The Supreme Court has held that “‘non compos mentis’” “includes all degrees of mental incompetency known to the law.” (*Hellman Commercial Trust & Savings Bank v. Alden* (1929) 206 Cal. 592, 603; *Gottesman v. Simon* (1959) 169 Cal.App.2d 494, 499.) Dr. Bloom, in a letter dated March 30, 1999, stated, “[Plaintiff] ‘continues to have a cycle of depression from the earthquake and it has diminished his capacity to act reasonably and in his own self interest.’” In addition, in his declaration, plaintiff stated that when the release was presented to him on January 16, 1997, he was 74 years old and depressed; moreover, he “was unable to understand the meaning of the release” and did not have an attorney to

provide legal advice. As noted above, no attorney signed the release as counsel for plaintiff.

Pursuant to Civil Code section 38, “A person entirely without understanding has no power to make a contract of any kind . . . .” Civil Code section 39, subdivision (a), provides, “A . . . contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission . . . .” If a person enters into an agreement when he or she is “entirely without understanding,” that contract is void. (Civ. Code, § 38; *Hellman Commercial Trust & Savings Bank v. Alden*, *supra*, 206 Cal. at pp. 602-605.) If a person enters into a agreement when he or she is “of unsound mind, but not entirely without understanding” the contract is not void, but voidable. (Civ. Code, § 39, subd. (a); *Hellman Commercial Trust & Savings Bank v. Alden*, *supra*, 206 Cal. at p. 605.) The Supreme Court has held: “In the absence of an adjudication of incompetency, it is necessary to allege and prove that the transaction was void for lack of understanding of its nature and effect. . . . ‘. . . [T]he test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? [Citation.] Did he actually understand the nature, purpose, and effect of the contract?’ One may be incompetent to some extent and yet have sufficient mentality to comprehend the nature and effect of a transaction and therefore execute a valid contract. An ‘unsound mind’ has been defined by the Standard Dictionary to include one which is weak, diseased, abnormal, or defective. It is equivalent to the term *non compos mentis*, which includes all degrees of mental incompetency known to the law. [Citation.] A contract which is challenged on the ground of incompetency is ordinarily not void, but merely voidable. [Citations.] . . . ‘The mental incapacity to avoid . . . a contract must amount to an inability to understand the nature of the contract and to appreciate its probable consequences.’” (*Id.* at pp. 603-604; see also *Jacks v. Estee* (1903) 139 Cal. 507, 511 [without the capacity to understand the transaction]; *Markus v. Lester* (1922) 59 Cal.App.

564, 566 [“The phrase ‘entirely without understanding’ means a want of capacity to understand transactions of the kind involved].”)

Here, Dr. Wilson opined that plaintiff was incompetent when the release of liability in the prior insurance bad faith case was executed on January 16, 1997. Dr. Bloom stated that plaintiff continued, as of March 1999, to have “diminished capacity to act reasonably . . . .” Further, plaintiff declared, “I was unable to understand the meaning of the release.” This evidence, taken together, sufficed to create a triable issue whether the release was void. As defendant concedes, if plaintiff’s release of liability in case No. BC130888 was void, it does not bar the present action. (*Backus v. Sessions* (1941) 17 Cal.2d 380, 382-384; *Knouse v. Nimocks* (1937) 8 Cal.2d 482, 487-492.)

### 3. Statute of limitations

Defendant contends plaintiff’s action is barred by the one-year statute of limitations set forth in the insurance policy. We find the present lawsuit is barred by the statute of limitations and is not revived by Code of Civil Procedure section 340.9, insofar as plaintiff claims the appraisers did not undertake sufficient investigation and he is owed additional benefits under the policy.

The insurance policy states, “**Suit Against Us.** No action can be brought unless . . . the action is started within one year after the date of loss.” The usual statute of limitations for an action upon a written contract is four years. (Code Civ. Proc., § 337; *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 80.) However, the Legislature has shortened the applicable statute of limitations to one year. Insurance Code sections 2070 and 2071 mandate a one-year statute of limitations for actions on standard form fire insurance policies, including homeowner and earthquake policies. (*Bialo v. Western Mutual Ins. Co.*, *supra*, 95 Cal.App.4th at pp. 80-81; see *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 680, fn. 2.) The contractual one-year statute of limitations applies to claims for both contract and implied

covenant breach. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1280; *Jang v. State Farm Fire & Casualty Co.* (2000) 80 Cal.App.4th 1291, 1301; *Velasquez v. Truck Ins. Exchange* (1991) 1 Cal.App.4th 712, 722.) Plaintiff's action was not filed within one year after the date of loss.

Plaintiff argues his claims are revived by Code of Civil Procedure section 340.9 which states: “(a) Notwithstanding any other provision or law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section[, January 1, 2001,] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section[, i.e., by January 1, 2002]. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage. [¶] (b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period. [¶] . . . . (d) This section shall not apply to either of the following: [¶] (1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section. [¶] (2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement.” The present action was filed on December 28, 2001, within the time permitted by Code of Civil procedure section 340.9, subdivision (a).

Defendant briefly asserts, in a footnote, that plaintiff's present action is not revived because, “[T]he claim has been ‘litigated to finality’ due to the [a]ppraisal and subsequent judgment.” (Code Civ. Proc., § 340.9, subd. (d)(1).) We agree that the amount of loss and damage sustained, as well as the sufficiency of the appraisers' investigation, has been “litigated to finality” within the meaning of Code of Civil Procedure section 340.9, subdivision (d)(1). Plaintiff's petition to vacate the appraisal

award on the ground the appraisers had not undertaken sufficient investigation to accurately determine the cost to repair or replace the property was denied by Judge Farrell on September 15, 1995. The appraisal award was confirmed by Judge Farrell on November 3, 1995, and judgment was entered thereon. Plaintiff did not appeal from the judgment confirming the award. The judgment was beyond direct attack on the effective date of Code of Civil Procedure section 340.9. Plaintiff's contract breach claim in the present case alleges defendant breached the insurance policy by unreasonably: failing to make required payments; making unreasonable demands on plaintiff; failing to make a prompt investigation; and forcing him to file this lawsuit. Given the final judgment entered on the appraisal award, plaintiff cannot now claim defendant breached the contract by failing to pay him additional insurance benefits for damage to his residence. Any such claim is barred by the one-year statute of limitations set forth in the policy and is not revived under Code of Civil Procedure section 340.9. (Code Civ. Proc., § 340.9, subd. (d)(1); *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1060 [a case is "litigated to finality" when the judgment "is beyond direct attack"]; compare, *Bialo v. Western Mutual Ins. Co.*, *supra*, 95 Cal.App.4th at pp. 82-83 [case revived pursuant to Code Civ. Proc., § 340.9, subd. (d)(1) when pending on appeal on the effective date of the revival statute].)

#### 4. Res judicata and collateral estoppel

Plaintiff's contract breach claim alleges defendant breached the insurance contract by unreasonably: failing to pay required benefits; making various unreasonable demands on plaintiff; failing to perform a prompt investigation; and forcing plaintiff to commence the present litigation. Defendant argues that, even if not barred by the statute of limitations, plaintiff is collaterally estopped to relitigate issues that were determined in the appraisal action. Those issues include whether plaintiff was entitled to recover an amount beyond that awarded by the appraisal and the extent of the appraisers'

investigation. We agree with defendant. (*Klubnikin v. California Fair Plan Assn.* (1978) 84 Cal.App.3d 393, 395-399; see *Sandler v. Casale* (1981) 125 Cal.App.3d 707, 713.)

Division Six of the Court of Appeal for this appellate district has held: “Res judicata prohibits the relitigation of claims and issues which have already been adjudicated in an earlier proceeding. The doctrine has two components. “In its primary aspect the doctrine of res judicata [or ‘claim preclusion’] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action.” . . . The secondary aspect is “collateral estoppel” or “issue preclusion,” which does not bar a second action but “precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.”” (*People v. Damon* (1996) 51 Cal.App.4th 958, 968 []; see also *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 339-340 []; Rest.2d Judgments, §§ 18-19, 27.) [¶] Most applications of res judicata involve prior judicial decisions, but several cases recognize that claims preclusion applies to arbitration awards as well. (See, e.g., *Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1015-1016 []; *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755 []; *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933, 939 []; see also 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 293, p. 838.) Other cases have concluded that findings made during arbitrations may be given collateral estoppel effect in a subsequent lawsuit. (See, e.g., *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1010 [] [uninsured motorist arbitration]; *Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 327-328 [] [commercial arbitration].)” (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335-1336; see also *Lehto v. Underground Constr. Co., supra*, 69 Cal.App.3d at p. 939 [“Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata”].) The judgment entered after the denial of plaintiff’s petition to vacate the award bars the relief he seeks by his contract breach claim. Summary judgment was properly entered as to plaintiff’s contract breach claim. Defendant does not argue that res judicata principles bar plaintiff’s implied covenant claim.

## 5. Implied Covenant Claim

We turn to the question whether a triable issue exists as to defendant's alleged implied covenant violation. We find no triable issue of material fact. The Supreme Court has held: "It has long been recognized in California that '[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' (Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 658 [.]") This principle applies equally to insurance policies . . . ." (Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal.4th 390, 400.) The Supreme Court has explained that tort damages may be available when an implied covenant claim arises out of an insurer's breach of contractual obligations: "'[F]or a variety of policy reasons, courts have held that [an insurer's] breach of the implied covenant will provide the basis for an action in tort.' ([Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 684.])" (Kransco v. American Empire Surplus Lines Ins. Co., *supra*, 23 Cal.4th at p. 400.) As the Court of Appeal summarized in *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148: "[A]n insurer must investigate claims thoroughly (*Egan [v. Mutual of Omaha Ins. Co. (1979)]* 24 Cal.3d [809,] 819 []); it may not deny coverage based on either unduly restrictive policy interpretations (*Delgado v. Heritage Life Ins. Co. (1984)* 157 Cal.App.3d 262, 277-278 []) or standards known to be improper (*Moore v. American United Life Ins. Co. (1984)* 150 Cal.App.3d 610, 637-638 []); it may not unreasonably delay in processing or paying claims (*McCormick v. Sentinel Life Ins. Co. (1984)* 153 Cal.App.3d 1030, 1048 [])." (Accord, e.g., *Waters v. United Services Auto. Assn. (1996)* 41 Cal.App.4th 1063, 1070 ["The gravamen of a first party lawsuit is a breach of the implied covenant . . . by refusing, without proper cause, to compensate the insured for a [covered loss] . . . or by unreasonably delaying payments due . . ."].) Moreover, the *Love* court held, the elements of an implied covenant claim, are as follows: "[T]here are at

least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause. [Citations.]” (*Love v. Fire Ins. Exchange, supra*, 221 Cal.App.3d at p. 1151.) In a footnote the court added, “Our interpretation that a plaintiff must show, at a minimum, benefits were delayed or withheld, accords with the analysis of the commentators: ‘Where benefits are *fully and promptly paid*, no action lies for breach of the implied covenant—no matter how hostile or egregious the insurer’s conduct toward the insured may have been prior to such payment. *I.e., absent an actual withholding of benefits due, there is no breach of contract and likewise no breach of the insurer’s implied covenant.* [Citation.]’ (Kornblum et al., Cal. Practice Guide: Bad Faith [(The Rutter Group] 1989), § 4:28, p. 4-9, italics added.)” *Love v. Fire Ins. Exchange, supra*, 221 Cal.App.3d at p. 1151, fn. 10; accord, *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 512.)

Plaintiff alleges defendant breached the implied covenant of good faith and fair dealing by unreasonably: withholding benefits due; forcing plaintiff into an unfair appraisal process without legal representation; refusing to make full payment for lost or damaged property under the policy; refusing to timely and fully pay plaintiff’s claim; engaging in lowballing; withholding payments for repairs or replacement of property; withholding full benefit payments; refusing payments in an attempt to coerce plaintiff into accepting less than the fair value of his claim; misrepresenting pertinent facts and policy provisions; not attempting in good faith to effectuate a prompt, fair, and equitable settlement of plaintiff’s claim; failing to thoroughly investigate and objectively evaluate plaintiff’s claim; interpreting the policy in an unduly restrictive manner; failing to acknowledge and act reasonably promptly upon communications; failing to adopt and implement reasonable standards for the prompt investigation and processing of claims; compelling plaintiff to initiate litigation to obtain benefits due under the policy; and failing to abide by the Insurance Commissioner’s rules. But the undisputed facts establish that: defendant promptly investigated plaintiff’s claim; attempted to make

payment under the policy; given a dispute as to the amount of the loss, pursued an appraisal to conclusion, and paid the benefits due under the policy as determined by the appraisers. Plaintiff has not presented any evidence defendant engaged in any of the conduct alleged in the first amended complaint. There is no evidence defendant unreasonably withheld benefits due. (*Love v. Fire Ins. Exchange, supra*, 221 Cal.App.3d at p. 1151.)

Plaintiff argues there was evidence of defendant's unreasonable conduct as follows: "In May of 1999, the plaintiff discovered evidence that the appraisal process was fixed. There would be no way for Mr. Wright of [defendant] to know the result of the appraisal process prior to the time it was announced unless he had been part of the decision process. His knowledge of the amount to be determined is reported in a phone con[v]ersation to a representative of the California Individual and Family Grant program. . . . Fixing an appraisal is bad faith. [¶] [Defendant] made various 'lowball estimates' based on partial investigation. [Defendant] refused to hire a structural engineer to report on the condition of the structure. [Defendant] refused to obtain an estimate of asbestos removal or do a lateral force analysis. [Defendant] obtained an estimate in May of 1994 showing the cost of replacement to be \$354,648. . . . This report was concealed from plaintiff and the appraisers. This is bad faith."

We agree with defendant that plaintiff's evidence in support of his claim the appraisal process was "fixed" fails to raise a triable issue as to that assertion. As defendant argues, "[T]he [evidence] does not indicate that Mr. Wright knew the amount of the award before it was issued, but simply that he provided the Grant Program with his estimate of the worth of the Gorsteins' claim. Nothing in the report of Mr. Wright's conversations with the Grant Program indicates he knew the amount of the Appraisal Award before it was issued."

Plaintiff asserts: "[Defendant] made various 'lowball estimates' based on partial investigation. . . . [Defendant] refused to obtain an estimate of asbestos removal or do a lateral force analysis." Plaintiff does not cite, and we have not found, any evidence in

support of those claims. There is no merit to his contentions. Plaintiff has failed to produce specific evidence as required by Code of Civil Procedure section 437c, subdivision (p)(2), of unreasonable conduct by defendant. Where the opposition only presents speculation in lieu of specific facts, summary judgment should be entered if the burden of production has shifted. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 490; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

Plaintiff contends defendant refused to hire a structural engineer to report on the condition of the residence. The evidence in support of that claim consists of the following assertions in plaintiff's declaration with reference to attachments thereto: the city building department's order to comply indicated a structural evaluation was needed, but defendant "never authorized a licensed structural engineer to inspect, test or make a report"; although the city building department stated a structural engineer should evaluate the structure, defendant "never authorized any review by a licensed structural engineer"; Karl Blaufuss, who was employed by the appraisers to evaluate the residence, was "only licensed as a civil engineer not a structural engineer"; and neither of the engineers employed by Cabrillo Geotechnical, a firm hired by defendant, was a licensed structural engineer. However, defendant presented evidence it did engage structural engineers to inspect plaintiff's residence. Lovelace Engineering inspected the property on two separate occasions, January 27, 1994, and March 16, 1994, and issued reports as to structural damage.

Plaintiff argues: "[Defendant] obtained an estimate in May of 1994 showing the cost of replacement to be \$354,648. This report was concealed from plaintiff and the appraisers." The evidence plaintiff cites is a one-page document with the heading "American Appraisal." The document references plaintiff's residence. It contains what appear to be costs estimates associated with repairs to the residence. One line, on which plaintiff relies, states, "Local Replacement Cost New-----\$354,648." This unexplained document is not evidence defendant acted in bad faith because "the cost of replacement"

was \$354,648. Plaintiff has not shown that a triable issue of material fact exists as to the implied covenant claim.

#### IV. DISPOSITION

The judgment is affirmed. Defendant, Government Employees Insurance Company, is to recover its costs on appeal from plaintiff, Bernard Gorstein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.